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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 49

MORTON SALT COMPANY,
a Corporation of Illinois,
Petitioner,

vs.

THE G. S. SUPPIGER COMPANY,
a Corporation of Delaware,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

Opinions of the Courts Below.

This case comes before this Court for review of a decree of the United States Circuit Court of Appeals for the Seventh Circuit.

The question to be determined by the Court is one of law. It arises from a decree entered upon a Motion for

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NOTE: Emphasis ours throughout this brief.

Summary Judgment under Rule 56* of the Federal Rules of Civil Procedure, in a patent suit filed by *The G. S. Suppiger Company, Respondent,* v. *Morton Salt Company, Petitioner,* in the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the complaint. Said decree was reversed by the said Circuit Court of Appeals.

The patent in suit relates to a machine for depositing *unpatented compressed salt tablets* of predetermined content into cans in the commercial canning of vegetables such as tomatoes and the like. The bill was dismissed by the District Court on the ground that the respondent had used its patent on the depositing machine in an *attempt to secure* a *limited monopoly in the salt tablets* deposited by the patented machine.

The Memorandum of the United States District Court for the Northern District of Illinois was filed January 31, 1940 (R. 56). It is reported in 31 Fed. Supp. 876. Its Findings of Fact and Conclusions of Law appear in the Record at pages 61, 62.

The opinion of the Circuit Court of Appeals of the Seventh Circuit was filed January 14, 1941. It is reported in 117 Fed. (2d) 968. It appears in the Record at pages 124-130. A petition for rehearing was denied March 11, 1941 (R. 157), which is the date of the decree to be reviewed.

A petition for writ of certiorari to review the decree of the said Circuit Court of Appeals reversing the decree of the District Court was filed on the 12th day of April 1941, (R. Cover). The petition was granted by this Court on the 26th day of May, 1941 (R. 162).

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* See Appendix.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347).

2. The matter to be reviewed arises in a suit under the Patent Laws of the United States, Judicial Code, Sec. 24(7) (28 U. S. C., Secs. 41-7).

3. *The question involved is one of law to be determined under said Patent Laws* and was raised on a Motion for Summary Judgment by your petitioner (R. 53) under Rule 56 of the Federal Rules of Civil Procedure.

Summary Statement of the Matter Involved.

The case to be reviewed is based on a complaint by the respondent in the United States District Court for the Northern District of Illinois, Eastern Division, charging infringement by your petitioner of respondent's patent on a machine for depositing tablets (specifically salt tablets) No. 2,060,645, granted to the Scientific Tablet Company (R. 70, 77), assigned June 30, 1938, to respondent (R. 2, 11).

Your petitioner filed an answer denying validity of the patent and infringement (R. 4). Said answer was amended (Par. 4a, R. 8-10) to present the defense that the respondent and its predecessor in title employed the patent in suit, contrary to law, to establish and maintain for itself a limited monopoly in the unpatented tablets (specifically salt tablets) to be deposited by the tablet depositing machine of the patent in suit, and that therefore respondent-plaintiff should be denied aid by a court in equity to enforce its rights under the p: ent laws.

The **business of respondent's predecessor and of respondent**, which acquired and continued that business, was **and is the manufacture and sale of salt tablets to canners.**

The salt tablet depositing machine of the patent in suit was leased to canners with a license in writing to use the machine of the patent in suit and a *patented process** involved in that use, *on condition that the salt tablets should be bought exclusively from respondent's predecessor, and afterwards from respondent* (R. 12, 13; Defendant's Exhibits No. 1 and No. 2, R. 31, 34; Offered R. 15, 16).

A motion for Summary Judgment (R. 53), in accord with Rule 56 of the Rules of Civil Procedure for the District Courts of the United States, based upon its amendment to its answer, and on depositions (R. 11-29), exhibits (R. 31-50) and affidavits filed by your petitioner, and affidavits filed by respondent (R. 50, 51), was granted by Judge William H. Holly, who filed a memorandum (R. 56), and entered a final decree dismissing the complaint (R. 64). Said decree was based on his Findings of Fact and Conclusions of Law (R. 61-63).

The District Court's Findings of Fact were adopted from Findings common to those presented by both petitioner (R. 57-59) and respondent (R. 59-61). They are summarized as follows:

The **business** of respondent here involved is the manufacture and sale of salt tablets of predetermined weight for use in the canning industry. **The end and aim of that business is the sale of salt tablets in which the profits lie. The salt tablets are not patented** (Finding of Fact 4, R. 62).

Respondent makes salt tablet depositing machines under the patent in suit and other patents. **Said salt tablet depositing machines,** however, **including that of the patent in suit,** are **merely secondary adjuncts to the business**—namely **the sale of salt tablets** (R. 28). Respondent did not sell but leased said machines in writing including a

* "Method of Flavoring in Canning, Preserving and Bottling Operations No. 1,887,073", R. 103-105.

license to use **the machine and also a patented process involved in that use* upon the specified condition and agreement by the lessee that respondent's unpatented salt tablets be used exclusively in said patented leased machine—specifically the depositing machine of the patent in suit** (Findings of Fact 2 and 4, R. 61, 62; Defendant's Ex. 1, R. 31—offered R. 15; Defendant's Ex. 2, R. 34—offered R. 16).

Two hundred salt tablet depositing machines of the patent in suit were in use under the said leases. **Two hundred lessee-licensee-canners using said salt tablet depositing machines of the patent in suit were bound by written agreement to buy the salt tablets to be deposited by said machines from the respondent exclusively** (R. 28; Finding of Fact 6, R. 62).

Your petitioner is in the business of mining, processing and selling salt, including salt tablets, to the canning industry. It also makes and leases **unpatented machines** *to the canning industry for depositing salt tablets, and particularly the accused machine in the instant case.* Its machines bear a tag: "Morton Salt Tablet Dispenser for Use with Morton Salt Tablets Only."

The final finding of the District Court is:

> "7. *There is no genuine issue as to any material fact involved in this case*" (R. 62).

Such finding was submitted by your petitioner (R. 59, Finding 11) and by respondent (R. 61, Finding 6).

The District Court's conclusion of law was:

> "1. **The plaintiff has attempted by the manner in which it carried on its business under the patent in suit to extend its patent monopoly beyond the boundaries described in the claims of said patent to cover**

*R. 12, 13—Q's 26-30; R. 14, Q's 45, 46; Patent 1,887,073, R. 102.

unpatented products not included therein. Plaintiff, by its patent in suit, has attempted to establish a limited monopoly in the sale of unpatented salt tablets in the canning industry. This is condemned under the law" (R. 62).

The Circuit Court of Appeals of the Seventh Circuit **reversed** the lower court, saying: "Due to the District Court's **entry of its decree in a summary proceeding**, we are not able to determine the **monopolistic extent of plaintiff's contract.** The court was clearly **in error in granting this summary judgment without an inquiry into the facts.** Unless the defendant can make **'a definite factual showing of illegality' arising from plaintiff's agreement** with its licensee, it was not entitled to judgment of dismissal" (R. 130).

Questions Presented.

The decision of the Circuit Court of Appeals for the Seventh Circuit presents the following questions:

1. Was it necessary for your petitioner to give evidence to show the "*monopolistic extent* of the" restraint of the trade in salt tablets resulting from "plaintiff's (respondent's) contract" to justify the decree of the District Court?

2. Was the District Court *in error in granting summary judgment without further inquiry into the facts* to determine whether respondent had *actually established an illegal monopoly* in the manufacture and sale of salt tablets?

3. Was it requisite for defendant (petitioner) to make "a *definite factual showing of illegality*" arising from plaintiff's (respondent's) agreement with its licensee, to be entitled to judgment of dismissal?

4. Does not the defense set up by petitioner (4a, R.

8-10) *arise from the patent laws and from respondent's attempt to extend its patent monopoly to unpatented articles not covered by said patent, but used in said patented article?*

Specification of Errors.

The Court of Appeals of the Seventh Circuit erred:

1. In holding that it is not the salt tablet as such but the salt which goes into the salt tablet which must determine the monopolistic tendency of respondent's lease contracts.

2. In holding that the District Court was clearly in error in granting this summary judgment without a further inquiry into the facts.

3. In not holding (a) that the respondent's activities were beyond the domain of its patent; (b) that as a practical matter, respondent's exercise of its patent monopoly tended to result in a limited monopoly in an unpatented commodity, namely, salt tablets used in the canning industry; and (c) that the respondent sought to derive its profits not from the invention itself but from the unpatented supplies. salt tablets, used in the patented depositing machine.

4. In holding that unless the petitioner can make "a definite factual showing of illegality" arising from respondent's agreement with its licensee, it was not entitled to judgment of dismissal.

5. In not holding that the illegality lay in the patent license agreement itself.

6. In reversing the decree of the United States District Court, for the Northern District of Illinois, Eastern Division.

SUMMARY OF ARGUMENT.

The essential conclusion of law made of record by the District Court was:

> "1. The plaintiff *has attempted by the manner in which it carried on its business under the patent in suit to extend* its patent monopoly beyond the boundaries described in the claims of said patent *to cover unpatented products not included therein.* Plaintiff, by its patent in suit, has *attempted to establish a limited monopoly* in the sale of unpatented salt tablets in the canning industry. This is condemned under the law" (p. 5, *supra*).

This conclusion of law was made by the District Court notwithstanding respondent's (plaintiff's) contention that your petitioner (defendant) "is not entitled to judgment because plaintiff" (respondent) *"has not obtained and cannot obtain a complete monopoly on the sale of salt tablets through the restrictions imposed on the use of the patented machines"* (R. 63).

The Court of Appeals, however, sustained respondent's (plaintiff's) contention and held that the conclusion of law 1 of the District Court was error.

The argument in this brief will be devoted to showing that the *District Court's conclusion of law on which its decree was based, was correct and in accord with the decisions of this Court; with a prior decision of the Circuit Court of Appeals of the Seventh Circuit below, following said decisions;* and *with the decisions of the Circuit Courts of Appeal of other Circuits.* And that the **endorsement** by the Circuit Court of Appeals below of respondent's (plaintiff's) contention as stated above, and its **reversal** of the decree of the District Court based on that contention, is *without sound legal precedent.*

ARGUMENT.

Error 1.

The extent of the field in which respondent has exercised its patent monopoly in attempt to create a limited monopoly in unpatented salt tablets is immaterial.

The Circuit Court of Appeals below found that (R. 129, (4)):

> "*The volume of all the salt business is large. The amount used in the canning field is so small that its complete control would not result in a* **monopoly of the salt industry.** *It* **is not the salt tablet** *as such, but the* **salt which goes into the salt tablet** *which must determine the monopolistic tendency of plaintiff's lease contracts.*"

The patent in suit relates to a *machine for depositing salt tablets* in cans in commercial canning of tomatoes and the like. The *business* of respondent and of its predecessor was the *manufacture and sale of salt tablets to commercial canners.* Said *business was carried on by respondent under the lease-license agreements* (Defendant's Exhibits 1 and 2) (p. 4—*supra*).

The unpatented, commercial product involved in this case is a salt tablet of predetermined content. It is used in a **small part of the canning field,** in which are also used both *loose salt* and *salt brine.* The **salt industry** is outside of any consideration to be had by the Court in this case. And obviously without relevancy is *the* **extent** *of the so much smaller canning industry,* **large** as it may be.

Error 2.

No Further "Inquiry Into the Facts" Required.

THE FACTS AS TO WHICH THERE IS NO GENUINE ISSUE WERE NOT DISCUSSED OR EVALUATED IN THE OPINION OF THE COURT OF APPEALS BELOW. SAID FACTS FULLY SUPPORT THE DECREE OF THE DISTRICT COURT.

The opinion of the Court of Appeals below states (R. 130) that "Due to the District Court's entry of its decree in a summary proceeding" * * * it is "not able to determine the monopolistic extent of plaintiff's contract"; that "the" District "Court was clearly in error in granting this summary judgment without an *inquiry* into the facts"; and that "unless the defendant" (petitioner) "can make **'a definite factual showing of illegality' arising** *from plaintiff's agreement with its* licensee(s), it was not entitled to judgment of dismissal."

In substance, the above statement is that, without **additional evidence** to show **illegality arising** *from respondent's (plaintiff's) lease-license agreements,* the decree below was error.

The Court of Appeals below has obviously nullified its own earlier decision in the *American Lecithin Co.* v. *The Warfield Co.* (105 Fed. (2d) 207, at 212), following the decisions of this Court named therein, which it has failed to properly apply to *those facts* in this case, *as to which there is no genuine issue* and which are **substantially on all fours with the material facts** in the Lecithin case. *Evidence of no additional facts is required in this case.* And there is no *"factual issue"* (Finding of Fact 7, p. 5, *supra*) in the case **to bar "the granting of a summary judgment"** (R. 130).

Error 3.

Rule of the Lecithin Case.

The Court of Appeals below failed to follow its own earlier decision in the case of *American Lecithin Co.* v. *The Warfield Co.* (105 Fed. (2d) 207 at 212).

Quoting its opinion in the Lecithin case, which was based upon the prior decisions of this Court upon the *legal question here involved,* the opinion of the Court of Appeals below in the instant case says:

> "Stated in another way, the underlying *question* in each case is directed to the inquiry as to *whether* (a) *the patentee's activities are within or beyond his domain.* In determining when courts will interfere with the patentee's power to sue infringers (contributory or direct) it is necessary to take into consideration *whether* (b) *as a practical matter, the exercise of the patent monopoly will result in a limited monopoly in an unpatented commodity,* and (c) *whether the patentee seeks to derive his profits not from the invention itself but from the unpatented supplies used in the invention.*"

Adopting this statement of the rule as *controlling in the Seventh Circuit* in following the decisions of this Court, and applying it to the present case the question is: whether

> **(a) The respondent's activities in the manufacture and sale of salt tablets to the canning industry are beyond its patent's domain**; whether
>
> **(b) As a practical matter, the exercise of the respondent's patent monopoly will result in a limited monopoly in an unpatented commodity, (salt tablets)**; and whether
>
> **(c) The respondent seeks to derive its profits, not from the invention itself, but from the unpatented supplies (salt tablets) used in the invention.**

Extent of the legal patent monopoly.

As stated in the opinion of the Court of Appeals below (R. 127):

> "A patent, in itself, is a monopoly—a legal monopoly. The limits of that monopoly are prescribed (and fixed) by the statute. They are to make, to sell, and to use the patented product or process for a period of seventeen years. The patent grant does not, however, extend to control of the making, the selling, or the use of an unpatented article which may be the product of the patented process or product, or which may be necessarily used by the licensee of the patented machine or product.
>
> "It is because a **patentee has a leverage**, a coercive argument, through the ownership of an important patent, the use of which he may grant or withhold from a customer, **that his position becomes one fraught with dangerous monopolistic possibilities.** *The temptation to use his legal patent monopoly so as to dominate a field beyond the legitimate coverage of his patent is great.* For this reason the **close scrutiny of patent license agreements is quite needful.**"

Accepting the above definition of the "Extent of the Legal Patent Monopoly" as sound, we now take the "Rule of the Lecithin Case" and apply it to those facts in this case as to which there is no genuine issue.

(a) The respondent's activities in the manufacture and sale of salt tablets to the canning industry are beyond its patent's domain.

The respondent's activities are directed to the exclusive sale of *unpatented salt tablets* to the canning industry for use in the salt tablet depositing machines of the patent in suit, which are *leased and licensed* to be used *under a written agreement by the lessee to use none other than salt tablets purchased from respondent exclusively.*

Respondent in this case has *succumbed to the "temptation to use"* its *"legal patent monopoly to dominate a field beyond the legitimate coverage of its patent"*, namely, the *limited field in the canning industry* where *salt tablets* are used instead of loose or bulk salt or salt brine.

And it is **futile for respondent to contend** as it did below (opinion, R. 129 (3)), that *its lessees are permitted to purchase and use other depositing machines.* If the purchase of another machine is contemplated, respondent's lessee-licensee is confronted at once with a suit for infringement by his lessor-licensor. In such suit, he would be *estopped to deny the validity* of the patent on his licensed machine, and *would be presented with a doubtful legal determination as to the question of infringement by* the *machine purchased.*

Again, there is the matter of infringement of his lessor's *process* patent (1,887,073, R. 103), also included in the lease-license agreement. (Defendant's Exhibit No. 1; R. 31, 32; offered R. 15.) The *validity* of *said process* patent he is likewise *estopped* to deny. And as to the *question of its infringement*, as respondent will not dispute, *he is concluded*, whatever machine he purchases, not having its origin in the respondent, and whatever salt tablets for use therein he purchases from others than the respondent.

The *Federal Trade Commission* v. *Sinclair Refining Company* case, 261 U. S. 463; 67 L. Ed. 746, upon which respondent based the aforesaid *contention*, has absolutely no significance or bearing upon the facts in this case. *There is nothing* in that case *charging the use of a patent to dominate or control an unpatented article beyond the legal domain of said patent.*

And it may be noted here that the opinion of the Court of Appeals below has given no consideration whatever to respondent's letters to the trade directing particular at-

tention to the close relation of patents on the depositing machines, including that of the patent in suit and of *the process patent;* and stating that the use of either the *patented machine* or of the *patented process* was *limited to the use of salt tablets bought exclusively from plaintiff's predecessor.* (See Defendant's Exhibits 3, 4 and 5, R. 37-41; offered R. 17 and Defendant's Exhibit 8, R. 45, 46; offered R. 24.)

It is manifest that the respondent's activities under its patent in suit in this case come squarely within clause (a) of the rule announced by the Court of Appeals below, when following this Court, in the Lecithin case.

(b) As a practical matter, the exercise of the patent monopoly will result in a limited monopoly in an unpatented commodity, salt tablets used in the canning industry.

As estimated by respondent, *two hundred of the depositing machines made under the patent in suit were in use by lessee-licensees, under one or the other forms of its lease-license agreement originated by its predecessor and continued in force by it, at the time of the depositions of Suppiger and Schofield* (p. 5—*supra*). *This significant fact* "**as to which there is no genuine issue**" is not mentioned in the opinion of the Court below. *Yet each and all of the lessee-licensees of these machines were bound by the lease-license agreement to buy all the salt tablets used in said machines from the respondent exclusively.*

Thus, *as a practical matter, the exercise of respondent's monopoly under the patent in suit resulted in a substantial lessening of competition or tendency to create a monopoly in the sale of the unpatented salt tablets, to the extent of*

said lessee-licensees of the two hundred leased machines made under the patent in suit. This is *certainly a limited monopoly in the field of use of salt tablets in the canning industry.* And said *monopoly* would be *extended* to include *each lessee-licensee added to the said two hundred by a continuance of respondent's aforesaid activities under its patent in suit.*

It appears, (b) as a practical matter, that the exercise of the respondent's patent monopoly will and in fact has resulted in a *limited monopoly in an unpatented, commercial commodity—salt tablets* used in the canning industry.

(c) The respondent seeks to derive its profits, not from the invention itself but from the unpatented supplies (salt tablets) used in the invention.

The *undenied evidence in the record is that* **the profits of the business lie in the sale of the salt tablets** (R. 21; Finding of Fact 4, R. 62). Plaintiff's attorney, when the depositions of Suppiger and Schofield were taken, *asked no questions of them to explain or detract from their free admission of that fact* (R. 22, 29).

Findings of Fact submitted by respondent (plaintiff) included the finding:

> **"4. The manufacture and sale of the salt tablets was the main business of plaintiff's predecessor. The plaintiff acquired that business in June, 1938, which it has since carried on as a subsidiary company. The end and aim of the business was and is the sale of the salt tablets in which its profits lie."** (R. 60.)

The affidavits of Suppiger and Schofield, filed shortly before the hearing in the District Court, *did not suggest that the nominal rentals of the patented depositing machines* **included a profit.** (R. 50, 51.) The *first intimation of profits on the patented depositing machine rentals*

in the *salt tablet business of respondent and its predecessor* **was presented at the argument in the Court of Appeals below.** In these circumstances that Court should have *given no credence* to respondent's *argument* repeated in the opinion (R. 130 (6)), that *any profit was included in said rentals.*

Finding of fact 4 by the District Court (R. 62) includes *material facts* involved in the case as to which "there is no genuine issue"; and particularly the fact that *"The end and aim of the business was and is* the *sale of the salt tablets in which its profits lie. The patented depositing machine is a mere secondary adjunct."* (See R. 21, Qs. 102, 103; R. 28, Q. 50.)

This Court *must concede that in the instant case:*—(*c*) *The respondent seeks to derive its profits, not from the invention itself but from the unpatented supplies,* namely, **salt tablets used in the invention.** *There is no genuine issue as to this fact, which is freely admitted by respondent's executive officers.* (R. 21, Qs. 102, 103; R. 28, Qs. 50-52.). *But this was ignored in the opinion of the Court of Appeals below.*

From the foregoing, **it is manifest that the facts in the instant case, as to which there is no genuine issue, fully support the decree of the District Court which followed the rule of the Lecithin case.**

Authorities.

As we have shown above, the facts in the instant case are substantially on all fours with the Lecithin case which consistently followed the decisions of this Court as announced in the cases named therein and on which defendant's motion was based. Neither the Lecithin case nor

those which it followed, namely the Carbice case (*Carbice Corporation of America* v. *American Patents Development Corp.*, 283 U. S. 27; 51 S. Ct. 334), nor the Leitch case (*Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458, 463; 58 S. Ct. 288, 290), depend upon the Sherman Anti-Trust Act or upon the Clayton Act. They are each founded on the principle announced by the Supreme Court in the Carbice case that a patentee "*may not exact as the condition of a license that unpatented materials used in connection with the invention shall be purchased only from the licensor; * * * to permit the patent owner to 'derive its profit, not from the invention on which the law gives it a monopoly, but from the unpatented supplies with which it is used' is 'wholly without the scope of the patent monopoly.' * * * If a monopoly could be so expanded, the* **owner * * * of a patent for a machine might thereby secure a partial monopoly on the unpatented supplies consumed in its operation.**" (51 S. Ct. 334, at 335; 283 U. S. 27, at 32.)

In neither the Lecithin case nor the Carbice or Leitch cases does it appear that the Court has found that *an actual illegal monopoly had been established.* Certainly, in the Carbice case the Court *required no inquiry as to the facts to determine whether the amount of solid carbon dioxide used in the patented "transportation package" was large enough to result in an illegal monopoly of the solid carbon dioxide industry.* And in the Leitch case the Court required *no inquiry as to the facts to determine whether the amount of bituminous emulsion used in the patented process was large enough to result in an illegal monopoly* of the *bituminous emulsion industry.*

Errors 4 and 5.

The Standard Oil case (*Standard Oil Company* v. *U. S.*, 283 U. S. 163; 51 S. Ct. 421), upon which the opinion of the Court of Appeals below is based, has no application to the instant case. That case related to cross-license agreements under oil cracking process and apparatus patents. The Supreme Court, after *finding nothing illegal* in the cross-license *agreements per se,* stated, as quoted by Judge Evans, (Opinion R. 128; 51 S. Ct. 421, pp. 425, 426; 283 U. S. 175):

> "But an agreement for cross-licensing and division of royalties violates the Act only when used to *effect a monopoly* or to fix prices, or to impose otherwise an unreasonable restraint upon interstate commerce." Citing *Bement* v. *National Harrow Co.,* 186 U. S. 70. * * * *United States* v. *General Electric Co.,* 272 U. S. 476 * * * and others.

Thereupon, this Court found it *necessary* "to *examine the evidence to ascertain the operation and effect of the challenged contracts.*" As a result, the Court decided that there was no unreasonable monopoly or restriction of competition and dismissed the bill.

The Standard Oil case thus differs from the Carbice and Leitch cases in that in the Standard Oil case *there was no illegality in the cross-licensing agreements directly restraining an article of commerce.* But in both the Carbice and Leitch cases as well as in the Lecithin case and the case at bar, there was *an illegal direct restraint of an unpatented article of commerce, either express or implied.* And *these restrictions were tied to a patent monopoly which did not include or cover such articles of commerce,* but *which the patentee attempted to monopolize under his patent, as in the case at bar.*

Petitions for writs of certiorari by each party to the Lecithin case were denied by this Court. (308 U. S. 609; 60 S. Ct. 171. 308 U. S. 609; 60 S. Ct. 175.) But the Lecithin case later was referred to by this Court with approval in the case of *Ethyl Gasoline Corporation* v. *United States,* 309 U. S. 436, at 459; 60 S. Ct. 618, at 626.

Philad Co. v. *Lechler Laboratories, Inc.,* 197 Fed. (2d) 747, decided by the Circuit Court of Appeals of the Second Circuit, and the recent case of *B. B. Chemical Co.* v. *Ellis,* (48 U. S. P. Q. 487; 117 Fed. (2d) 829), decided by the Court of Appeals of the First Circuit, each followed the cases of this Court upon which the decision in the Lecithin case was based.

In neither of the above cases, either in the Supreme Court or in the Courts of Appeal of the First or Second Circuits, or in the Lecithin case in the Seventh Circuit, does it appear that the Court had required evidence that an actual illegal monopoly had been established in the articles over which the patentee attempted to extend his patent.

Thus, the sole exception to the general trend of authority is to be found in the decision of the Circuit Court of Appeals of the Seventh Circuit in the instant case.

Even in cases arising under the Sherman Act, the fact that the party accused "has not obtained * * * a complete monopoly," has been held without determinative effect in a recent decision by this Court. *Fashion Originators' Guild of America, Inc., et al.,* v. *Federal Trade Commission,* (61 S. Ct. 703-707). This Court said in that case:

> "Nor is it determinative in considering the policy of the Sherman Act that petitioners may not yet have achieved a complete monopoly. For 'it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.'

United States v. *E. C. Knight Co.*, 156 U. S. 1, 16, 15 S. Ct. 249, 255, 39 L. Ed. 325; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 237, 20 S. Ct. 96, 105, 44 L. Ed. 136. It was, in fact, one of the hopes of those who sponsored the Federal Trade Commission Act that its effect might be prophylactic and that through it attempts to bring about complete monopolization of an industry might be stopped in their incipiency."

Rule 56—Summary Judgment.

The Court of Appeals below stressed the fact that this case was disposed of on a motion for summary judgment. It says, "The Court was clearly in error in granting this summary judgment without an inquiry into the facts."

But clearly, as we have shown, the District Court made a full "inquiry into the facts" which were presented to it by both parties. And in particular that Court found (as agreed by both parties) **"there is no genuine issue as to any material fact involved in this case"** (p. 5 *ante*).

Rule 56 (c)* provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law."

The District Court acting under the Rule found that *the facts before it as to which there was no genuine issue entitled petitioner to a judgment as a matter of law.* That the case was decided on a motion for summary judgment is immaterial, if the facts justified that conclusion.

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* Appendix.

CONCLUSION.

We submit that the decree of the Court of Appeals below should be reversed, and that the decree of the District Court, dismissing the bill, should be sustained.

Respectfully submitted,

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October 10, 1941.
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APPENDIX.

Rule 56—Summary Judgment.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.